IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

PUBLIC.RESOURCE.ORG, ET AL., Appellants, v. MATTHEW BENDER & COMPANY, ET AL., Appellees.	)	No. M2022-01260-COA-R3-CV

APPELLEE MATTHEW BENDER & COMPANY, INC.'S BRIEF

On Appeal from the Chancery Court for Davidson County, Tennessee
Public.Resource.org et al. v. Matthew Bender & Company, Inc., et al.
Case No. 22-1025-III

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STATEMENT OF THE ISSUES

1. Did the Chancery Court correctly conclude that the Tennessee Public Records Act does not supersede the other statutory provisions in Tennessee that dictate the means of access to the Tennessee Code Annotated?
2. Did the Chancery Court err by concluding that Respondent-Appellee Matthew Bender & Company, Inc., a division of LexisNexis Group, both of which are private companies, is the functional equivalent of a government entity and thus is subject to requests under the Tennessee Public Records Act?
3. Did the Chancery Court err by deciding the validity of the Tennessee Code Commission's claimed copyright under federal law over certain editorial material included in the Tennessee Code Annotated?

INTRODUCTORY STATEMENT

Respondent-Appellee Matthew Bender & Company, Inc., a division of LexisNexis Group ("Lexis") seeks to reverse the Chancery Court's unnecessary and unfounded determination that Lexis operates as the functional equivalent of government entity – thus subjecting it to the requirements of the Tennessee Public Records Act (the "TPRA") – when Lexis performs specific services for the Tennessee Code Commission (the "Code Commission") as a private contractor.

The Code Commission is responsible for overseeing the contents and ensuring the publication of the Tennessee Code Annotated (the "TCA"). The TCA is one of two official sources of the statutory law in Tennessee, the other being the unannotated Tennessee Code. The Code Commission contracts with Lexis to compile, index, edit, and arrange the materials in the TCA and to provide services in support of the publication and distribution process. The Code Commission has final editorial responsibility for every word in the TCA, and the Code Commission owns the copyright to the copyrightable contents of the TCA. The Code Commission

sets the price at which Lexis must sell the TCA. By state law, the Code Commission can only compensate Lexis for its services by allowing Lexis to keep the proceeds from the sale of the TCA.

Appellants David L. Hudson, Jr. and Public.Resource.org ("PRO") seek to access the complete and current electronic version of the TCA. Rather than access the TCA through the means and at the cost prescribed by Tennessee law for every other user, however, Appellants have demanded a free copy of the TCA through a request under the TPRA directed to LexisNexis. Because the TPRA is inapplicable to Lexis, a private company, Lexis denied Appellants' request.

The Chancery Court of Davidson County, Tennessee denied Appellants' petition to compel Lexis to provide electronic copies of the TCA, correctly determining that access to the TCA is provided by different statutes, and thus excepted from the TPRA.

After reaching its holding determining the issue before the court denying the electronic production of the TCA, however, the Chancery Court decided to continue its analysis and incorrectly found that if the TCA *were* to be subject to disclosure under the TPRA, Lexis acted as the functional equivalent of a government entity when Lexis performed specific, contracted-for services for the Code Commission, a holding with dramatic implications for Lexis, or any other state contractor. As a result, Lexis is potentially subject to requests under the TPRA on other matters. The Chancery Court further held, in violation of exclusive subject matter provisions of the U.S. Constitution governing copyright law – and despite the fact that Appellants did not raise the issue – that the Code Commission's copyright over certain components of the TCA was invalid.

This Court should uphold the substantive result that the Chancery Court reached on the applicability of the TPRA to the TCA. This Court should also reverse the Chancery Court's determination that Lexis is the functional equivalent of a government entity, and thus subject to the obligations of the TPRA. The Chancery Court's designating Lexis a functional equivalent of

a government entity threatens to subject Lexis and other private contractors to future TPRA requests, apart from the outcome of the specific request in this case. Finally, the Chancery Court's foray into federal copyright, a subject solely reserved for federal courts under the United States Constitution, must be vacated.

STANDARD OF REVIEW

The determination of whether the TPRA applies to the TCA when it is held by Lexis is a question of law "to be determined by the totality of the circumstances." *City Press Communs., LLC v. Tenn. Secondary Sch. Ath. Ass'n*, 447 S.W.3d 230, 234 (Tenn. Ct. App. 2014) (citing *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002)). The same is true of the subject-matter jurisdiction question of federal copyright law. This Court reviews these questions of law de novo, without any presumption of correctness accorded to the Chancery Court's decision. *Id.*

STATEMENT OF FACTS

Appellants submit a TPRA Request to Lexis for the TCA and Appellants' Subsequent Petition.

On May 16, 2022, Appellants wrote to Lexis to request access to "[e]ach electronic version of the most current Tennessee Code Annotated, reproduced in its entirety" (the "Lexis Request"). R. 12; R. 66-68. On May 20, 2022, Lexis denied Appellants' TPRA request after Lexis determined that the TPRA does not apply to Lexis because Lexis "is not the functional equivalent of a government entity." R. 12; R. 70. Lexis did not deny the Lexis Request on any other grounds. *Id.* On August 11, 2022, Appellants filed a Petition for Access to Public Records and to Obtain Judicial Review of Denial Access under the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-503 and 10-7-505, in the Chancery Court for Davidson County, Tennessee (the "Petition"). R. 1-70.

The Petition included as exhibits numerous TPRA requests that Appellants and their predecessors had submitted to the State of Tennessee, but which had not previously been disclosed to Lexis. *Id.* For instance, on October 8, 2021, Professor Gautam Hans, then a professor at Vanderbilt Law School, and PRO filed a TPRA request with the Revisor of Statutes, in her capacity as Executive Secretary for the Code Commission, seeking the same documents sought in the Lexis Request. R. 54. The State of Tennessee, on behalf of the Revisor of Statutes, denied this request, writing that the Revisor of Statutes did not maintain in its possession "an electronic version of the most current version of the [TCA] *in its entirety*." R. 56-57 (emphasis in original). On January 22, 2022, Professor Hans renewed his request, R. 59-61, which the State again denied, reaffirming that the Revisor of Statues did not maintain a current electronic version of the entirety of the TCA. R. 63-64. None of these prior requests were disclosed in the Lexis Request, which was made by Appellants and not Professor Hans. R. 66-68.

Lexis Provides Services in Support of Code Commission's Production of the TCA Under a Contract with the Code Commission.

The Code Commission produces and publishes the TCA. R. 5; Tenn. Code Ann. § 1-1-101. The Code Commission consists of the Chief Justice of the Tennessee Supreme Court, the Attorney General and Reporter of the State of Tennessee, the Director of Legal Services of the General Assembly of the State of Tennessee, all serving *ex officio*, plus two additional members appointed by the Chief Justice. *Id.* The Code Commission is directed by statute to:

> Formulate and supervise the execution of plans for the compilation, arrangement, classification, annotation, editing, indexing, printing, binding, publication, sale, [and] distribution [of the TCA].

Id. The Code Commission can enter contracts for services to carry out its duties, including entering into "contracts with a law book publisher" to provide administrative support services. *Id.* Before the final publication of the TCA, the Code Commission "shall certify in writing" its approval of

the manuscript and must affix "an appropriate written certificate of approval" to the manuscript to lend the manuscript authority as the official laws of the State of Tennessee. *Id.*

The Code Commission contracts with Lexis for these services under a 2019 Restated Agreement for Publication (the "Lexis Contract"). R. 20-52. Under the Lexis Contract, Lexis "shall perform and provide all editorial services necessary for the publication of the TCA." R. 20. The Code Commission has final authority over the contents and formatting of the TCA, including over items such as page size, typeface, paperweight, organization, and specific language. R. 43-52. Lexis must "implement style changes requested by the [Code] Commission," R. 50, and Lexis must abide by all decisions of the Code Commission. R. 31. The Code Commission sets the prices for the distribution of the TCA and any components. R. 29-30. The Lexis Agreement does not provide for direct compensation to Lexis; Lexis may collect revenue from its exclusive right to publish and sell the TCA, in accordance with Tennessee Law. R. 31-32; Tenn. Code Ann. § 1-1-113. Although Lexis may publish and sell the TCA, ownership of the TCA, including the ownership of the copyright for any copyrightable materials contained within the TCA, remains vested exclusively with the Code Commission. R. 30-31.

The Code Commission Intervenes in Opposition to the Petition.

On August 12, 2022, the Attorney General intervened in the Petition on behalf of the Code Commission. R. 109-110. The Code Commission sought to intervene in the Petition to "protect its property interest in the TCA." R. 121. Although Lexis denied the Lexis Request because Lexis determined it was not the functional equivalent of a government entity, and thus not subject to TPRA requests, the Code Commission raised two additional arguments in its intervention – first, that title 1, chapter 1 of the TCA creates an alternative statutory scheme governing access to the TCA that removes the TCA from the scope of the TPRA, and second, that portions of the TCA are protected by copyright owned by the Code Commission. R. 113-131.

The Chancery Court Denies Appellants' Petition.

On August 30, 2022, the Chancery Court dismissed Appellants' Petition in a written decision (the "Chancery Court Decision"). R. 357-70. The Chancery Court found that the TCA was exempt from disclosure under the TPRA because the sale, publication and distribution of the TCA is governed by title 1, chapter 1 of the Tennessee Code Annotated. R. 259-65. Although this decision should have ended the matter and rendered all other arguments in the Petition moot, the Chancery Court nonetheless ruled on two additional issues – whether Lexis is the functional equivalent of a government entity, and thus subject to TPRA requests, and whether the Code Commission's claimed copyright over portions of the TCA is valid as a matter of law.[1] The Chancery Court found that Lexis was the functional equivalent of a government entity because Lexis "is performing a governmental function by producing and publishing" the TCA. R. 366. The Chancery Court also found that no portion of the TCA is eligible for copyright protection under federal law. R. 366-68.

SUMMARY OF THE ARGUMENT

While the Chancery Court correctly determined that the TCA is exempt from disclosure under the TPRA because access is "otherwise provided by state law," Tenn. Code Ann. § 10-7-503(a)(2)(A), the Chancery Court incorrectly determined that Lexis is the functional equivalent of a government agency. Under Tennessee law, when a private entity "serves as the functional equivalent of a government agency," the TPRA applies to the private entity as it would to a government agency. *Cherokee.*, 87 S.W.3d at 78-79. In *Cherokee*, the Tennessee Supreme Court

[1] The Chancery Court ruled on these additional issues "in the interest of avoiding a time-consuming and expensive remand" if this Court were to reverse the Chancery Court's ruling on the statutory exception. Since this Court reviews issues relating to the TPRA de novo, however, such remand would be unnecessary. *See City Press*, 447 S.W.3d at 234.

created a four-factor test for determining functional equivalency. *Id.* at 79. A court applying *Cherokee* must examine: (1) the extent to which the private entity performs a government function; (2) the level of government funding of the private entity; (3) the degree of government control over the private entity; and (4) whether the private entity was created by a legislative act or previously determined to be subject to the TPRA. *Id.* Courts must "look to the totality of the circumstances in each given case, and no single factor will be dispositive." *Id.* Additionally, the court in *Cherokee* cautioned that providing "specific, contracted-for services to governmental agencies" would not subject a private entity to the strictures of the TPRA, and noted that a "private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government." *Id.*

None of the *Cherokee* factors weigh in favor of functional equivalency here. Lexis does not perform a government function. Lexis is, instead, the type of private contractor the *Cherokee* court excluded from the scope of the TPRA because Lexis does not exercise the discretionary authority of the Code Commission. Although Lexis does provide *services to* the Code Commission, Lexis does not ever act *in the place of* the Code Commission. The Code Commission retains final authority over all contents of the TCA; the Code Commission sets the terms of access to the TCA, including its price; and the Code Commission has the final responsibility for conferring official status on the drafts of the TCA that Lexis produces. In other words, Lexis cannot independently act as though it were the Code Commission. No Tennessee court has found functional equivalency where a private entity is not vested with the power to act on behalf of the government. Lexis therefore does not perform a governmental or public function. This *Cherokee* factor weighs decidedly against a finding of functional equivalency.

Turning to the second *Cherokee* factor, Lexis is not funded directly by the Code Commission, because Tennessee law prohibits the Code Commission from directly subsidizing the publication of the TCA. Tenn. Code Ann. § 1-1-113(b). Nor is Lexis indirectly funded by the Code Commission, because the Code Commission has not diverted revenue to Lexis that would otherwise be collected by the Code Commission. To the contrary, Lexis pays the Code Commission for the right to publish and sell the TCA. Any funds received by Lexis from customers of the TCA would not weigh in favor of functional equivalency because the funding would only amount to remuneration for specific services and does not suggest the Code Commission is providing funding to Lexis in an attempt to outsource its own operations. This *Cherokee* factor weighs heavily against functional equivalency.

Third, Lexis is not controlled or regulated by the Code Commission, which is the focus of the third C*herokee* factor, because the Code Commission only has oversight over the product that Lexis produces, not Lexis itself. Appellants cite the provisions in the Lexis Contract that allow the Code Commission to dictate the exact specifications of the TCA as evidence of functional equivalency; but this is not the sort of oversight that the court in *Cherokee* identified as indicating functional equivalency. Where Tennessee courts have found this factor to weigh in favor of functional equivalency, the government has had oversight authority over a private entity's *operations*, not just the services that it provides. The Lexis Agreement does not provide for any control by the Code Commission over Lexis's operations. The fact that the Code Commission has control over the specifications of the TCA but not Lexis, without more, weighs against functional equivalency.

Finally, Lexis is a private company that was not created by any legislative act, and Lexis has never been determined to be open to public access under the TPRA. This fourth *Cherokee*

factor also weighs strongly against functional equivalency. All four *Cherokee* factors weigh decidedly against functional equivalency. The Chancery Court incorrectly determined – without any analysis beyond a conclusory adoption and incorporation by reference the reasoning and authority of Appellants' – that Lexis is the functional equivalent of a governmental agency, and its ruling on this issue should be reversed.

Because Lexis is not the functional equivalent of a governmental agency, it is not subject to the TPRA. Lexis therefore properly denied the Lexis Request.

Even though the Chancery Court erred in determining Lexis is the functional equivalent of a government agency, the Chancery Court correctly determined that the TCA, when held by the government itself, is exempt from TPRA disclosure because access to the TCA is instead governed by title 1, chapter 1. The TPRA contains an exception where access to records is "otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a)(2)(A). Requiring distribution of the TCA through the TPRA would undermine the legislature's chosen method of providing public access to the TCA in a manner that ensures uniformity and consistency.

Finally, the Chancery Court exceeded its authority when it determined that the Code Commission's claimed copyright over portions of the TCA is invalid. The validity of a copyright is a matter of federal law over which federal courts have exclusive jurisdiction. Moreover, from Lexis's perspective, the underlying validity of the Code Commission's copyright is immaterial – Lexis is contractually bound to uphold the Code Commission's copyright, and Lexis cannot be charged with independently determining the validity of this copyright in response to a TPRA request. If Appellants wish to challenge the Code Commission's copyright, they may do so in a federal action against the Code Commission. But for the purposes of the Petition, all that matters is that the Code Commission claims a copyright, which Lexis must protect. The Chancery Court

therefore exceeded its authority when it ruled on this issue, and its decision on this issue must be vacated.

ARGUMENT

The TPRA is a wide-ranging piece of legislation that aims to ensure citizens of the State of Tennessee have access to the documents and information the State generates in performing the essential services of government. The rights afforded under the TPRA are not unlimited, however, and the TPRA does not supersede its own express exceptions.

I. LEXIS IS NOT THE FUNCTIONAL EQUIVALENT OF A GOVERNMENTAL ENTITY AND THEREFORE IS NOT REQUIRED TO PROVIDE ACCESS TO RECORDS UNDER THE TPRA.

In 2002, the Tennessee Supreme Court addressed the question whether any citizen pursuant to the TPRA may access any records of a private entity who acts on behalf of a state or other governmental body. The answer was "no."

In *Cherokee*, the court clarified the application of the TPRA to private entities, holding that "[w]hen a private entity's relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight [through the TPRA] should be preserved." 87 S.W.3d at 78-79. However, the court in *Cherokee* was careful to clarify that the functional equivalency test should be applied only in certain cases:

> We caution that our holding clearly is not intended to allow public access to the records of every private entity which provides any specific, contracted-for services to governmental agencies. ***A private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government***.

Id. at 79 (emphasis added). After *Cherokee*, the legislature amended the TPRA to incorporate this doctrine, clarifying that "[a] governmental entity is prohibited from avoiding its disclosure obligations by contractually delegating its responsibility to a private entity." Tenn. Code. Ann.

§ 10-7-503(6). *Cherokee* created a non-exclusive four-factor test to determine functional equivalency:

> "[1] to what extent the entity performs a governmental or public function . . . [; 2] the level of government funding of the entity; [3] the extent of government involvement with, regulation of, or control over the entity; and [4] whether the entity was created by an act of the legislature or previously determined" to be subject to the [TPRA].

Gautreaux v. Internal Med. Educ. Found., Inc., 336 S.W.3d 526, 529 (Tenn. 2011) (quoting *Cherokee*, 87 S.W.3d at 79). Although the extent to which "the entity performs a governmental or public function" is the logical "cornerstone" of the *Cherokee* test, courts must "look to the totalityof the circumstances in each given case, and no single factor will be dispositive." *Cherokee*, 87. S.W.3d at 79; *see also Gautreaux*, 336 S.W.3d at 529 ("Although we described the first factor as being the 'cornerstone' of the analysis, no single factor is dispositive.").

In the instant case, none of the *Cherokee* factors weigh in favor of determining that Lexis is the functional equivalent of a government entity but weigh decidedly against such a finding. Lexis does not perform an inherently governmental function by providing specific, contracted-for services to the Code Commission. Lexis is not funded by the Code Commission. Lexis, as an entity, is not regulated or controlled by the Code Commission. And, finally, Lexis has never been determined to be subject to the TPRA. The Chancery Court's conclusory determination that Lexis is "performing a governmental function by producing and publishing the [TCA]"—and thus subject to the TPRA—should be reversed. Ch. Ct. Decision, at 10.[2]

[2] Indeed, the Chancery Court failed to consider the other factors in the *Cherokee* test, instead choosing to "adopt[] the reasoning and authorities of the [Appellants]" without further elaboration. *Id.*

A. Lexis does not perform a governmental function under the first *Cherokee* factor, because Lexis does not exercise the delegated authorities or responsibilities of the Code Commission.

Lexis does not perform a governmental or public function in assisting with the TCA publication, because Lexis does not, and cannot, act with the authority of the Code Commission or on behalf of the Code Commission. Lexis only provides "specific, contracted-for services" to the Code Commission that do not implicate a traditional government function. *Cherokee*, 87 S.W.3d at 79. *Cherokee* and subsequent decisions draw a clear line between private entities that merely provide services to the government and those that, from the public's perspective, stand in the place of the government—and are thus subject to the requirements of the TPRA. Only "when an entity assumes ***responsibility*** for providing ***public functions*** to such an extent that it becomes the functional equivalent of a governmental agency" does the TPRA apply. *Id.* (emphasis added). Lexis does not occupy such a position of power over the citizens of Tennessee, and thus Lexis does not perform a traditionally governmental or public function under the first *Cherokee* factor.

i. Tennessee courts have only found that a private entity performs a governmental function where the private entity acts in the place of the government from the public's perspective.

For a private entity to perform a governmental or public function under the first prong of *Cherokee*, the private entity must exercise some discretionary authority on behalf of the government over the general public. Tennessee courts applying *Cherokee* have found the first factor to weigh in favor of functional equivalency only where, but for the existence of the private entity, the general public would interact directly with the government to access the public services provided by the private entity.

In *Cherokee*, the court found that Cherokee Children & Family Services, Inc. ("CCFS") performed a governmental function, because CCFS handled "providing...and supervising childcare placements under [Tennessee Department of Human Services ('TDHS')] guidelines" to indigent

families using state funds.[3] 87 S.W.3d at 79. CCFS served as a "brokering agency" that screened applicants for eligibility and directed them to approved childcare providers. *Id.* at 71. Before TDHS contracted with Cherokee to manage the brokering of childcare placements, TDHS performed this function itself. *Id.* at 79. By arranging childcare placements and determining eligibility, CCFS was the gatekeeper between indigent families seeking subsidized childcare and the state and federal grants overseen by TDHS that provided this public benefit.

Similarly, in *Allen v. Day*, the Tennessee Court of Appeals found that a privately-owned company that managed the day-to-day operations of a government-owned arena performed a government function because the management company "participates in making binding governmental decisions regarding the management of the Arena." 213 S.W.3d 244, 256 (Tenn. Ct. App. 2006). The management company had the authority to establish pricing, "including the price of admittance" to the arena, "supervise the use" of the arena, and contract for the use of the arena. *Id.* at 255. As a result, members of the general public effectively used the arena—a public building—at the discretion of the private management company.

In another case, a private contractor operating a correctional facility performed a government function, because the State delegated its responsibility to carry out the constitutional requirement for the "State to provide for its prisoners" to the company. *Friedmann v. Corr. Corp. of Am.*, 310 S.W.3d 366, 375-76 (Tenn. Ct. App. 2009) ("Operating correctional facilities is more than a traditional state function: the state has no higher duty" than to administer justice). And prisoners, as persons literally in the custody of the State, had no choice but to interact with the

[3] CCFS did not directly distribute state funds to childcare providers, however, CCFS functioned as the brokering agency that arranged placements and so effectively controlled the distribution of these funds by determining which childcare providers would care for indigent children. *Id.* at 71.

private contractor that "provided recreational, health, and food service to inmates, while also administering disciplinary rules and procedures." *Id.* at 371. Put differently, the prison operator acted as a gatekeeper between prisoners in State custody and basic necessities the State was obligated to provide.

The Court of Appeals also has held that the Tennessee Secondary School Athletic Association ("TSSAA") performed a governmental function by "directing and managing the extracurricular sporting activities of almost every high school in the state of Tennessee." *City Press Communs., LLC v. Tenn. Secondary Sch. Ath. Ass'n*, 447 S.W.3d 230, 240 (Tenn. Ct. App. 2014). In assessing this first *Cherokee* factor, the court noted that "it is undeniable that education is a government function" and that the Tennessee Board of Education had previously supervised high school athletics. *Id.* at 238. Thus, although the TSSAA was non-profit and not officially vested with the authority of the Tennessee Board of Education, from the public's perspective, the TSSAA was a proxy for the Board with respect to access to interscholastic athletics.[4] *Id.* at 238-39. By establishing and enforcing the rules for participation, the TSSAA was the gatekeeper between students wishing to participate in interscholastic athletics and the public benefit of coordinated, statewide competition that included public schools.

Finally, in *Wood v. Jefferson County Economic Development Oversight Committee, Inc.*, the Court of Appeals found that a non-profit economic development committee exercised a public function by "promoting economic development ***on behalf of*** Jefferson County and its municipalities." No. E2016-01452-COA-R3-CV, 2017 Tenn. App. LEXIS 643, at *12 (Ct. App. Sep. 26, 2017) (emphasis added). The committee was also responsible for distributing public funds

[4] At the time of the *City Press* court's decision, "eighty-two percent of [TSSAA] members [were] public schools." *Id.* at 233.

for economic development, which could "fairly be said to be a governmental function." *Id.* at *14. Like previous cases, the committee functioned as a gatekeeper between the public and a public benefit—specifically, taxpayer revenues allocated to economic development—and exercised discretion over the provision of that benefit.

In contrast, where a private entity provides contracted-for services that do not involve exercising discretion over the public's access to a public benefit or resource, courts have found the first *Cherokee* factor not to weigh in favor of functional equivalency. In *Gautreaux*, the University of Tennessee College of Medicine ("UTCOM") contracted with the Internal Medicine Education Foundation ("IMEF") to "record the hours during which UTCOM faculty members supervised residents" and to "pay UTCOM faculty members for teaching services." 336 S.W.3d at 528. IMEF did not perform a government function, however, because:

> UTCOM did not delegate the responsibility to manage or administer UTCOM's teaching program to IMEF. IMEF did not control whom UTCOM employed as a faculty member or the manner in which the faculty taught or supervised UTCOM's students.

Id. at 530. Instead, IMEF "merely acted as bookkeeper" which was "not the extensive perform of a governmental function contemplated by *Cherokee*." *Id.* Although IMEF undoubtedly acted in support of a public benefit (state-sponsored medical education), because IMEF did not have the delegated responsibility to exercise discretion over the management or administration of that benefit. Hence, this Court held it did not perform a government function.

Similarly, a third-party search firm did not perform a government function when it identified a list of potential candidates for a city's police director position because the services performed "were incidental to the selection of the director." *Memphis Publ'g Co. v. City of Memphis*, No. W2016-01680-COA-R3-CV, 2017 Tenn. App. LEXIS 507, at *18 (Ct. App. July 26, 2017). In *City of Memphis*, the court noted that "the City was not obligated to choose its Police

Director from the list produced" and that the search firm's responsibilities were "essentially administrative." *Id.* at 17. The city retained ultimate hiring authority, and as a result, the search firm did not perform a governmental function under the first *Cherokee* factor. *Id.* ("The governmental function here is the hiring of the director of police, and this function was never delegated or assigned to the [search firm]."). Although the search firm assisted the administration of the candidate search, it did not control access (i.e., hiring) to the benefit (the job).

In all the cases where the first *Cherokee* factor weighed in favor of functional equivalency, the general public was put in a position of relying on a private entity's discretion in performing a function that was either previously performed by the government or would be performed by the government had the private entity not been contracted with. Where, as in the instant case, a private entity only performs administrative services that do not involve discretionary action over the general public, however, the first *Cherokee* factor weighs strongly against functional equivalency.

ii. Lexis does not perform a government function, because Lexis does not exercise the discretion or authority of the Code Commission in performing the contracted-for services.

Lexis does not perform a government function under the first *Cherokee* factor, because Lexis does not exercise the discretionary authority of the Code Commission in performing the contracted-for services. From the public's perspective, Lexis does not act in place of the Code Commission. As a result, the first *Cherokee* factor weighs against functional equivalency here.

Lexis performs administrative services in support of the Code Commission's governmental function; but the Code Commission has not delegated responsibility to Lexis to perform that function with any discretion. Like the search firm in *City of Memphis*, Lexis provides "essentially administrative" services but does not have authority to bind the Code Commission or make final editorial decisions over the TCA. 2017 Tenn. App. LEXIS 507, at *18. "The governmental function here is the [creation of the TCA], and this function was never delegated or assigned to

[Lexis]." *Id.* at *17; *see also Gautreaux*, 336 S.W.3d at 530 (private entity does not perform governmental function where there is no "delegate[ion] [of] the responsibility to manage or administer").

The pertinent question for the first *Cherokee* factor is not whether the Code Commission performs a governmental function, but rather, whether Lexis has assumed responsibility from the Code Commission to perform that function. Appellants argue that because "Lexis performs the quintessentially governmental function of producing and publishing the law of Tennessee" the first *Cherokee* factor "weighs heavily in favor" of finding functional equivalency. Appellants' Br. at 29.

Quintessence is not, however, the test. Lexis does not perform a government function just because it provides specific, contracted-for services to a government entity that performs an important function. The pertinent inquiry for this Court is not whether the Code Commission performs a public function, but whether Lexis ***itself*** performs a government function in undertaking the acts necessary to fulfill its contractual obligations to the Code Commission. *Cherokee* and its progeny clearly recognize that a contractor can provide services *to* the state without performing the same government function *as* the state. *See, e.g., Cherokee*, 87 S.W.3d at 79 ("A private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government."), *Gautreaux*, 336 S.W.3d at 530 (evaluating services IMEF provided in support of UTCOM's public function); *City of Memphis*, 2017 Tenn. App. LEXIS 507, at *17-18 (performing "essentially administrative tasks" in support of government function of hiring police director did not weigh in favor of functional equivalency); *c.f. Wood*, 2017 Tenn. App. LEXIS 643, at *13 (economic development committee itself performed government function in the place of county and municipal governments). If every

contractor that performed services in support of a governmental function necessarily performed a governmental function itself, the first *Cherokee* factor would be meaningless.

Here, Lexis provides "specific, contracted-for services" to the Code Commission; but the Code Commission has not delegated the responsibility of performing its governmental function to Lexis; instead the Code Commission merely has tasked Lexis with performing specific services. *Cherokee*, 87 S.W.3d at 79 (private entity performs government function only when entity "assumes ***responsibility*** for providing public functions") (emphasis added). Under the contract with the Code Commission, Lexis performs two functions: (1) publicly distributing the unannotated Tennessee Code, and (2) preliminarily creating annotations for the TCA distributing the final versions of the TCA as approved by the Code Commission. R. 20-52. The Code Commission maintains full control over: (1) the final contents of the unannotated Tennessee Code and the TCA; (2) the certification of the volumes as the law of Tennessee; and (3) the means of distribution and price of the TCA. R. 20-52; *see also* Tenn. Code Ann. §§ 1-1-105, 109. At no point in the performance of services for the Code Commission does Lexis act on behalf of or in the place of the Code Commission, and Lexis itself does not assume responsibility for providing any public function.

Lexis, therefore, does not act in the place of the Code Commission. Only the Code Commission can alter the terms of access to or the contents of the TCA. Lexis, in managing the administrative aspects of the publication and distribution of the TCA, does not exercise the power and responsibility of the state. It merely provides a service to the state. As a result, Lexis does not perform a government function.

Additionally, the State of Tennessee has *never* directly controlled the physical act of the publication and distribution of the laws of Tennessee – this has always been a function performed

by private contractors who do not act in the place of the government. *See generally* Eddie Weeks, A History of Tennessee Statutory Law: Complications, Codifications, and Complications (Lexis 2021) (noting private publishers have always been responsible for the actual printing of the laws of Tennessee, while the State has been responsible for the contents of those laws). Courts examining the first *Cherokee* factor have often looked at whether the government performed the private entity's function directly as an indicator of whether it is a governmental function. *See, e.g., Cherokee*, 87 S.W.3d at 79 (noting "TDHS directly performed these services prior to entering the contracts with [CCFS]"); *City Press*, 447 S.W.3d at 238 (Board of Education had performed function and would have performed function absent creation of TSSAA); *Friedmann*, 310 S.W.3d at 375 (State directly managed all prisons before statute allowing contracting with private operators). In addition to the fact that Lexis's services to the Code Commission do not involve the performance of a governmental function, the fact that the State of Tennessee has *never* directly performed the physical services of binding, printing, and distributing the TCA to customers further supports a conclusion that Lexis does not perform a governmental function under the first *Cherokee* factor.

B. The remaining *Cherokee* factors weight against functional equivalency because Lexis is not funded, controlled, or created by the Code Commission.

The Chancery Court did not address the remaining *Cherokee* factors after its summary conclusion that Lexis "is performing a governmental function," instead choosing to adopt *in toto* "the reasoning and authorities" of Appellants without further analysis. Ch. Ct. Decision at 10. With any actual judicial analysis, however, the remaining *Cherokee* factors do not in fact support a conclusion of functional equivalency. Lexis is not controlled by the Code Commission, Lexis is not funded by the Code Commission, and Lexis was not created by the Code Commission or any

other government entity. For the reasons set forth below, these factors all weigh strongly against a finding of functional equivalency.

i. Lexis receives no funding directly from the State, and Lexis does not receive indirect funding under its contract with the Code Commission.

Turning to the second *Cherokee* factor, Appellants concede that Lexis does not receive direct funding from the Code Commission or the State of Tennessee generally. Appellants' Br. at 33. Indeed, the Code Commission is statutorily prohibited from making direct payments to Lexis for its services. Tenn. Code Ann. § 1-1-113(b) ("The commission shall not be authorized to subsidize the publication of the code out of public funds."). Instead, Lexis "shall be required to depend for compensation upon the proceeds of the sale of the [TCA]." *Id.* Appellants argue, however, that this arrangement somehow constitutes "indirect government funding" that supports a finding of functional equivalency. Appellants' Br. at 33 (citing *City Press*, 447 S.W.3d at 236). This argument fails for two reasons. First, Lexis is not indirectly funded by the government because the government would not collect revenue from the sale of the TCA if Lexis did not. Second, when examining government funding under *Cherokee*, the pertinent inquiry is not whether an entity receives money from the government in exchange for services – as almost any private contractor or vendor would – but rather whether the private entity receives government funding at a level that suggests the entity's core operations are dependent on government funding.

Lexis does not receive indirect funding from the government because Lexis does not collect revenues that the State would otherwise collect. In *City Press*, the TSSAA collected revenue from ticket sales to championship tournaments that constituted the "vast majority" of its funding. 447

S.W.3d at 236.[5] However, if the TSSAA had not collected that revenue, "the local schools would be collecting and spending the money." *Id.* at 235. The court found indirect government funding because revenue that otherwise would have been collected by the government (through public schools) was directed to TSSAA. *Id.*; *see also Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 299 (2001) (determining TSSAA to be a state actor for constitutional purposes and noting TSSAA "exercises the authority of the predominantly public schools to charge for admission to their games" and "enjoys the schools' moneymaking capacity as its own"). Lexis does not collect revenue otherwise due to the State, as in the long history of the TCA and its predecessors, the State of Tennessee has never directly published and sold the TCA. This has always been a private function performed by private entities. Lexis therefore is not indirectly funded by the State.

Further, the level of revenue received by Lexis from customers for publishing and distributing the TCA would not indicate functional equivalency. Courts applying *Cherokee* have focused on whether the amount of government funding rises to the level that suggests the government is subsidizing the entity itself, rather than paying for a service. Expressed another way, for government funding to suggest functional equivalency, the amount paid to a private entity must approach the amount the government itself would spend to perform that function. *See, e.g., Cherokee*, 87 S.W.3d at 79 ("over ninety-nine percent of [CCFS's] funding came from governmental sources"); *Allen*, 213 S.W.3d at 257-58 (government "solely responsible" for cost incurred by private contractor in management of city arena); *Wood*, 2017 Tenn. App. LEXIS 643,

[5] The court also noted that TSSAA employees "accrue and/or receive retirement benefits through the same [state-sponsored] retirement plan that covers state employees." *Id.* at 239. Although not direct funding per se, this clearly indicates a level of government support beyond mere payment for services.

at *13 (committee received between 60 and 65% of funding directly from government).[6] In all these cases, the level of government funding was such that it amounted to existential funding for the private entity – in other words, the cost the government would have spent to undertake the tasks directly. Mere payment of market rates for services, however, does not weigh in favor of functional equivalency. *C.f. City of Memphis*, 2017 Tenn. App. LEXIS 507, at *18 (payment of $40,000 for search services did not weigh in favor functional equivalency).[7]

The low level of funding received by Lexis confirms that the contractual arrangement Lexis has with the Code Commission, namely payment for services, does not rise to the level of pervasive government involvement. Lexis derives only a small portion of its overall revenue as an entity from the sale of the TCA. More importantly, Lexis's *infrastructure and organization* is not reliant on government funding – inside Tennessee or generally. R. 218-19. Indeed, the State of Tennessee has *always* relied on outside publishers to support the creation of the TCA precisely because the Legislature wished to avoid the cost of creating the infrastructure to provide these services. Weeks, *supra*, at 88 (contract with private published most expedient and satisfactory method of

[6] Appellants also suggest that *Friedmann* supports finding that this second *Cherokee* factor weighs in favor of functional equivalency here because the Court should examine the percentage of Lexis's revenue generated in Tennessee that comes from TCA sales. Appellants' Br. at 34 (citing *Friedmann*, 310 S.W.3d at 376). *Friedmann* is readily distinguishable, however, because *only* the State can contract with a private prison operator, and by implication, the State's cost to use a private prison would otherwise be spent funding State-operated prisons.

[7] In analyzing whether private entities are state actors under the Fourteenth Amendment, the U.S. Supreme Court has stated that acts of private contractors "do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982). State action only exists where funding indicates "pervasive entwinement" between the government and the private entity. *Brentwood Acad.*, 531 U.S. at 298.

maintaining current and accurate annotated code). Lexis has its existing infrastructure as a private, commercial entity because of the significant revenue generated from *non*-governmental sources.

Lexis's contract with the Code Commission was also the result of a competitive procurement. R. 214. The Code Commission sets the price of the TCA at "the lowest figure which in its discretion is consistent with high editorial and publishing quality." Tenn. Code Ann. § 1-1-113. The claimed indirect funding Lexis is receiving does not indicate the Code Commission "delegate[d] its *responsibility* to a private entity," Tenn. Code Ann. § 10-7-503(a)(6) (emphasis added), but rather that it is compensating Lexis for "specific, contracted-for services" that do not suggest functional equivalency. *Cherokee*, 87 S.W.3d at 79.

ii. Lexis is not controlled by the Code Commission in a way that suggests functional equivalency because the Code Commission does not control Lexis's operations, but merely specifies the product that Lexis must provide.

Lexis is not controlled by the Code Commission in the performance of its specific, contracted-for services because the Code Commission does not control the manner in which Lexis performs its operations as an entity within the scope of the third *Cherokee* factor. Appellants attempt to contort this factor of the *Cherokee* analysis to support their position by citing at length the statutory and contractual requirements for publication, such as the size of type, the grade and weight of paper, and other "minute technical specifications." Appellants' Br. at 30. But while the Code Commission maintains strict control over the *product* that Lexis produces – as any purchaser would of a vendor – the Code Commission has no control or oversight over Lexis as a private business.

Only where a government agency maintains control or oversight over a private entity itself does this *Cherokee* factor suggest functional equivalency. For instance, in *City Press*, the extent of government "involvement with, regulation of, or control over" the TSSAA weighed in favor of

functional equivalency where government officials "influence and enforce the bylaws of the TSSAA, ***essentially controlling the TSSAA's purpose*** – to regulate interscholastic sport competition." 447 S.W.3d at 237 (emphasis added); *see also Allen*, 213 S.W.3d at 260 (factor weighed in favor of functional equivalency where government oversight was "not merely limited to evaluating [the private entity's] performance, but rather constitute[d] ***pervasive governmental control***") (emphasis added). In contrast, where government oversight extends only to the performance of services under a contract, this factor does not weigh in favor of functional equivalency. *See, e.g., Gautreaux*, 336 S.W.3d at 530 (regulation does not suggest functional equivalency where control "concerned only the contract governing the reimbursements for payments to UTCOM faculty"); *City of Memphis*, 2017 Tenn. App. LEXIS 507, at *19 (noting "there is nothing to demonstrate that the City has regulated or exercised control" beyond performance requirements stated in contract). Government control over a private entity only suggests functional equivalency where the level of government regulation or control is of such an extent that the government can require the private entity ***to behave as the government would have to***. *Allen*, 213 S.W.3d at 260 (noting contract provided extensive oversight necessary for government to "fulfill its responsibility to the public to ***ensure that the Arena is operated and maintained in a manner consistent with public facilities***") (emphasis added) (quotations omitted).[8]

[8] Federal courts analyzing whether a private entity is a state actor for constitutional purposes also examine the level of government control over the entity, and government regulation only indicates state action where regulation is so extensive as to "demonstrate[e] that the State was responsible for decisions made by the entity in the course of its business." *Adams v. Vandemark*, 855 F.2d 312, 316 (6th Cir. 1988); *see also Lansing v. City of Memphis*, 202 F.3d 821, 832 (6th Cir. 2000) (entity not a state actor where there were "clearly established separate spheres of responsibility" for entity and government).

Here, the Code Commission's "control" extends only to the specifications of the services and products that Lexis must provide, the same as any state contractor. The Code Commission does not control Lexis's employment decisions, Lexis's organizational practices, or Lexis's operations generally. R. 212-13. Nor does the Code Commission have the right to audit Lexis's financials beyond the extremely limited right to audit charges to the Code Commission. R. 35; *compare with Allen*, 213 S.W.3d at 259 ("unqualified" right to audit all books and records and requiring government approval of annual budget); *Cherokee*, 87 S.W.3d at 80 (contracts authorized audits of CCFS's "activities" and requiring advance approval of "allowable costs"). Simply put, the Code Commission does not regulate or control Lexis – the Code Commission merely provides detailed specifications for the product that Lexis provides as a vendor of contracted services delivering that product. This does not rise to the level of "government involvement with, regulation of, or control over" Lexis and this third *Cherokee* factor weighs strongly against functional equivalency.

iii. Lexis was not created by an act of the Legislature nor has Lexis been previously determined by law to be open to public access.

Turning to the fourth *Cherokee* factor, Lexis has been a private company since its inception and has never previously been determined by law to be open to public access under the TPRA or otherwise. R. 210. Appellants concede that this factor weighs against functional equivalency here. Appellants' Br. at 34. This factor therefore weighs against functional equivalency.

Moreover, in other cases finding functional equivalency, courts have noted that even where this factor weighed against functional equivalency, other facts indicated a close relationship between government and the private entity that suggested the private entity was created for the purpose of fulfilling a governmental or public function, even if the entity was not created by an act of the Legislature. *See, e.g., Wood*, 2017 Tenn. App. LEXIS 643, at *23-24 (other economic

development committees were created by statute and subject to public access requirements); *Cherokee*, 87 S.W.3d at 79 (non-profit's activities dedicated by contract exclusively to performing contract with state agency); *City Press*, 447 S.W.3d at 237, 38 (TSSAA previously determined to be state actor under Fourteenth Amendment by the Supreme Court and previously designated by State Board of Education as official organization "to supervise and regulate athletic activities"). In each of these cases, even though the private entity was not directly created by an act of the Legislature, there were significant indicators that the private entity was created solely to perform a governmental function. In contrast, Lexis, which had existed for decades before its publication of the TCA, was awarded the contract with the Code Commission through a competitive bidding process that had Lexis compete against other publishers. R. 214. Far from being "irrelevant," the facts associated with the fourth *Cherokee* factor here weigh strongly against functional equivalency when viewed against prior cases.

C. Because Lexis is not the functional equivalent of a government agency, it is not subject to the access requirements of the TPRA, regardless of the contents of the records sought.

As a private entity that is not the functional equivalent of a government agency, Lexis is not subject to the requirements of public access under the TPRA. Importantly, this holds true no matter how "public" the records sought would be if held by the government. Even if a record would be undeniably subject to disclosure under the TPRA if held by a government entity, Lexis as a private entity cannot be required to produce it. *See Swift v. Campbell*, 159 S.W.3d 565, 572 (Tenn. Ct. App. 2004) ("[R]ecords in the hands of private parties are beyond the reach of the public records statute."); *see also Allen*, 213 S.W.3d at 251 (TPRA limited to "public records" meaning those official records held by government agencies or a functional equivalent). The logical corollary of this clear rule is that functional equivalency should be determined without regard to how "public" the records being sought are.

Appellants attempt to blur this distinction, arguing that Lexis must be the functional equivalent of a government agency because the records Appellants seek are fundamentally public. *See* Appellants' Br. at 23 (citing philosophical and legal scholarship arguing the importance of public access to the law). Appellants argue too much, as their position would subject ***all*** of Lexis's internal records to disclosure under the TPRA, not just the copies of the TCA that Appellants sought in their TPRA request.[9] That is not, and cannot be, the law in Tennessee, else no private company would contract with the State.

Regardless of whether this Court believes that the TCA should be accessible through a TPRA request ***when it is held by a government entity***, this Court should reverse the Chancery Court's ruling that Lexis is the functional equivalent of a government agency. Lexis is not the functional equivalent of a government agency, for the reasons set forth above, and therefore has no obligation to provide public access to its records under the TPRA. Appellants' Petition must be dismissed on this basis.[10]

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[9] As set forth in Section II, *infra*, the Legislature has provided an alternative means of access to the TCA. However, even if this Court upholds the Chancery Court's ruling on this issue, this Court should reverse the determination of functional equivalency even if doing so would not change the ultimate outcome in this case, as determination of public access would factor into any future actions seeking TPRA access to Lexis's records under the fourth *Cherokee* factor.

[10] Appellants' Petition, and this Appeal, concern only ***Lexis's*** denial of the TPRA request made to Lexis itself. Appellants' have not challenged the State's denial of prior TPRA requests directed to the State itself. Regardless of whether this Court believes those denials were proper, the Petition must be dismissed because the Petition seeks only records held by Lexis, a private entity which is not the functional equivalent of a government agency – and which therefore cannot be ordered to produce records under the TPRA.

II. THE LEGISLATURE HAS PROVIDED AN ALTERNATIVE STATUTORY SCHEME TO PROVIDE ACCESS TO THE TCA, AND AS A RESULT, THE TCA IS NOT SUBJECT TO DISCLOSURE UNDER THE TPRA.

Even though the Chancery Court incorrectly determined that Lexis is the functional equivalent of a government agency under the *Cherokee* test, the Chancery Court correctly determined that the Petition should be dismissed because the Legislature has created a different statutory scheme to provide access to the TCA.[11]

While it is true that the TPRA is a statute that "shall be broadly construed" to promote access to public records, the statute is not without exceptions. Tenn. Code Ann. § 10-7-505(d). Importantly, the TPRA does not mandate the disclosure of public records via a TPRA request where access is "otherwise provided by state law." *Id.* § 10-7-503(a)(2)(A); *see also Tennessean v. Metro. Gov't of Nashville & Davidson Cnty.*, 485 S.W.3d 857, 865 (Tenn. 2016) (characterizing the provision as a "general exception to the [TPRA]" to prevent conflicts between laws). In this case, access to the TCA is "otherwise provided by state law" because title 1, chapter 1 of the TCA provides the exclusive means of access to the TCA. The Legislature recognized this implicit exception in Tenn. Code Ann. § 3-10-108 (the "reproduction, publication, and sale of the [TCA] in any form, in whole or in part, shall be pursuant to the provisions of title 1, chapter 1"). Requiring the distribution of the TCA through the TPRA would undermine the separate statutory scheme the Legislature has set forth. The Chancery Court properly denied the Petition on this basis.

[11] Again, even though the Chancery Court correctly determined the TCA is exempt from disclosure under the TPRA, the determination that Lexis is the functional equivalent of a government agency and therefore subject to TPRA requests should be reversed, even if the Court agrees as a separate matter that the TPRA is not the proper statutory vehicle with which to access the TCA.

A. The general exception to the TPRA for records where access is "otherwise provided by state law" applies here and is not limited to requests for access through the legislative computer system.

The Chancery Court determined that a "combination of statutes" indicate "legislative intent" that reproduction, distribution, and publication of the TCA shall be made only by the process set forth in title 1, chapter 1. These statutes – both directly and indirectly related to the Code Commission – clearly indicate an implicit exception to the TPRA for the TCA.

i. The Code Commission is vested with the exclusive authority to manage the publication and distribution of the TCA with the assistance of a third-party publisher.

The Code Commission is legislatively tasked with the ultimate responsibility to manage, among other things, the "publication, sale, distribution and the performance of all other acts necessary for the publication of an official compilation of the statutes…including an electronically searchable database of such code." Tenn. Code Ann. § 1-1-105(a). To assist with this task, the Code Commission shall contract "with a law book publisher for the…publication, sale, and ***distribution*** of the [TCA]." Tenn. Code Ann. § 1-1-106(a) (emphasis added). The Code Commission is additionally prohibited from directly paying for the publication and distribution of the TCA, and instead "shall require that the cost of publication be borne by the publisher" who "shall be required to depend for compensation upon the proceeds from the sale of the [TCA]." Tenn. Code Ann. § 1-1-113(b). However, the Code Commission must set the price of the TCA "at the lowest figure" necessary to ensure "high editorial and publishing quality." *Id.* at (c). Taken together, these statutes represent a legislatively prescribed mechanism for public access to the TCA that balance the need for public access against the Legislature's chosen method of securing and paying for expert publishing assistance provided by a third-party contractor.

The Legislature has recognized this in other statutes, including statutes passed after the TPRA. For instance, Tenn. Code Ann. § 12-6-102, governing the distribution of printed acts to

state offices, states that "[t]his section…shall not apply to the [TCA], [or] any supplement thereto or replacement volume thereof." And Tenn. Code Ann. § 3-10-108(d), governing public access to the legislative computer system, notes that while the legislative computer system may be accessed by the general public in certain circumstances, "the ***reproduction***, publication, and sale of [the TCA] in any form, in whole or in part, shall be pursuant to the provisions of title 1, chapter 1." (emphasis added). This provision was enacted in 1987, thirty years ***after*** the Legislature enacted the TPRA in 1957. *See* 1987 Tenn. Pub. Acts, ch. 163, § 8 (enacting § 3-10-108); 1957 Tenn. Pub. Acts, ch. 285, § 1 (enacting the TPRA). The Legislature enacted the exception to public access to the legislative computer system (whether through TPRA requests or otherwise) with the awareness of the exception to the TPRA that it was creating. *See Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010) (Legislature is presumed to know the "state of the law on the subject under consideration at the time it enacts legislation") (citing *Murfeesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 683 (Tenn. 2005)). Thus, the Legislature clearly intended to create an exception to the general scheme for public access for the TCA.

The history of the publication of the laws of Tennessee indicates the policy reasoning behind this choice. Although the Chancery Court correctly recognized the exception to the TPRA for the TCA in its decision, the Chancery Court implicitly questioned the soundness of such a choice. *See* Ch. Ct. Decision at 9 (finding an exception to the scope of the TPRA while "putting aside…whether the Legislature's policy of not providing citizens free access to [the TCA] is or is not sound . . . ."). But the scheme for public access set forth in title 1, chapter 1 is animated by sound policy considerations on the part of the Legislature. Before the creation of the Code Commission, publication of the laws of Tennessee occurred in a haphazard manner through a host of private publishers. *See* Weeks, *supra*, at 63 ("One problem facing the users [of prior volumes]

was the delay in the supplementing of the work. The legislature could amend a section…but the Code might not reflect that change for many months."). As a result, there were numerous "unofficial compilations of Tennessee law," but there "was still only one official Tennessee Code, and it was again hopelessly out of date." *Id.*

The Legislature created the Code Commission with the intent of contracting with a single publishing vendor to ensure that there was a clear and uniform understanding of what the official law of the State of Tennessee was. In a report proceeding the creation of the Code Commission, it was noted that:

> Other states have found that the most satisfactory method of obtaining a new annotated code and keeping it currently up to date is through a contract between the State and a private publisher, with the work of the publisher checked, verified and certified by a permanent code commission.

1953 House Journal, pages 213-17. To further ensure this uniformity, the Legislature requires the Code Commission to adopt an official seal and certify the current edition of the TCA. Tenn. Code Ann. § 1-1-111(b). This certified volume "shall constitute prima facie evidence of the statutory law of this state" and shall be used "as the official compilation of the statutory law." *Id.* When promulgating the official laws of the State, it is paramount that the State "speak with one voice." The statutory scheme for access to the TCA set forth in title 1, chapter 1 and recognized elsewhere in Tennessee law is not an unnecessary restriction on access – it is a reasoned choice by the Legislature to balance the needs for public access against the equally important need to ensure there is a uniform understanding of what the laws of the State of Tennessee are at a given point.

Appellants argue that the Chancery Court was wrong to determine that access to the TCA is "otherwise provided by state law" because Tenn. Code Ann. § 3-10-108 applies only where access is sought through the legislative computer system. This argument twists the nature of the exception. Tenn. Code Ann. § 3-10-108(d) is not the *source* of the exception, rather, it is a statute

passed in *recognition* of the general exception created by title 1, chapter 1. Whether the specific copy of the TCA that Appellants seek are housed on the legislative computer system or not, title 1, chapter 1 provides for the exclusive means of access to the TCA.

ii. Tennessee courts have consistently recognized exceptions to the TPRA where access is "otherwise provided by state law" in other contexts.

Tennessee courts have consistently recognized that where the Legislature has provided a means of access separate from the TPRA, the general exception set forth in the TPRA applies. In particular, courts have limited access to public records based on the rules of discovery. In *Waller v. Bryan*, the Tennessee Court of Appeals found that restrictions on discovery in the Tennessee Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-201 *et seq.* (the "TPCPA"), removed records from the scope of the TPRA because the TPCPA was a statute that governed access as "otherwise provided by state law." 16 S.W.3d 770, 777 (Tenn. Ct. App. 1999) ("These procedures, rights, and restrictions on post-conviction proceedings discovery fit Appellant's document request directly in the 'otherwise provided by state law' category."). To allow access under the TPRA would effectively amend the TPCPA, and "[i]f this amendment is to be made, ***it should be made by the Legislature and not this Court***." *Waller* involved a TPRA request made by a party to the post-conviction litigation, but the Tennessee Supreme Court has since recognized that restrictions on discoverable materials set forth in the Tennessee Rules of Criminal Procedure constitute a general exception to the TPRA even where the requesting party is a third-party media organization. *Tennessean*, 485 S.W.3d at 873 (discovery limitation is "the more specific provision and controls the discovery and disclosure of materials...to the exclusion of the [TPRA]"). Just as the exception rooted in the rules of discovery in criminal cases applies even when the party seeking access to public records is not itself a criminal defendant, the exception rooted in title 1, chapter 1 applies regardless of where the specific copy of the TCA that is sought is housed.

iii. Tennessee's rules of statutory interpretation require the Court to recognize the exception set forth in title 1, chapter 1.

Contrary to Appellants' argument, recognizing the exception to the TPRA set forth in title 1, chapter 1 does create an "unnecessary conflict" between laws. The "well-settled" rule of statutory interpretation applicable here is that "the more specific of two conflicting statutory provisions controls." *Id.* at 872 (citing *Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010)). The TPRA is a statute of broad applicability, whereas title 1, chapter 1 governs ***only*** the reproduction, publication, and distribution of the TCA. To the extent there is any conflict between the two provisions, the narrowly applicable provisions must govern. *Id.* And, as mentioned previously, the Legislature's intent when creating the Code Commission supports this result. Construing the TPRA to provide direct access to the TCA would undermine the Legislature's chosen method of providing, and paying for, distribution of the TCA.

It is true that the TPRA must be "broadly construed so as to give the fullest possible public access to public records," Tenn. Code Ann. § 10-7-505(d), but this mandate does not allow a court to ignore the Legislature's judgment that in certain circumstances, "the reasons not to disclose a record outweigh the policy favoring disclosure." *Allen*, 213 S.W.3d at 261. Where the Legislature has created or recognized an exception to the scope of the TPRA, the exception must "not [be] subsumed by the admonition to interpret the [TPRA] broadly." *The Tennessean v. Tenn. Dept. of Pers.*, No. M2005-02578-COA-R3-CV, Tenn. App. LEXIS 267, at *15 (Tenn. Ct. App. 2007). "Where the legislature has clearly established a statute's parameters, courts are not free to apply a 'broad' interpretation that disregards specific statutory language." *Id.*; *see also Tennessean*, 485 S.W.3d at 873 (disregarding exception where state law otherwise provides access would create "a 'public policy exception' to the [TPRA] that only the [Legislature] is authorized to enact"); *Waller*, 16 S.W.3d at 777 (allowing access despite provisions of TPCPA would effectively amend statute

and "[i]f this amendment is to be made, it should be made by the Legislature and not this Court"). The Appellants' public policy arguments in favor of providing free access to the TCA through TPRA requests should properly be directed to the Legislature, not this Court. Unless and until the Legislature makes such a change, title 1, chapter 1 provides the exclusive means of access to the TCA.

B. In the alternative, even if the TCA must be produced through the TPRA, the cost for reproduction must be the cost that the Code Commission requires Lexis to charge.

Alternatively, even if this Court determines that title 1, chapter 1 does not create *access* to the TCA as "otherwise provided by state law," the *cost* for the reproduction of the TCA is the same cost that the Code Commission has determined Lexis must charge for the sale of the TCA. The TPRA prohibits a governmental entity from "assess[ing] a charge to view a public record ***unless otherwise required by law***." Tenn. Code Ann. § 10-7-503(a)(7)(A)(i) (emphasis added). Even if this Court determines that title 1, chapter 1 does not create an overall mechanism for access to the TCA – i.e., if the TCA is available through TPRA requests – the cost the requestor must pay is the cost determined the Code Commission. Tenn. Code Ann. § 1-1-113 (Code Commission shall set the price for access). In other words, even if Appellants may request copies of the TCA through a TPRA request submitted to a governmental entity[12] rather than a purchase order to Lexis, the cost must be the same – the cost the Code Commission has directed Lexis to charge for copies of the TCA, whether in physical or electronic format.[13]

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[12] As set forth in Section I, *supra*, regardless of whether this Court determines the TCA is itself subject to TPRA disclosure, Lexis is not the functional equivalent of a government agency and thus not subject to TPRA requests.

[13] *See also* Tenn. Code Ann. § 10-7-503(a)(7)(B) (permitting a custodian of public records to assess "the custodian's reasonable costs incurred in producing the requested material").

Appellants here seek ***free*** access to the TCA, which the Legislature, in its judgment, has chosen not to provide through the means requested by the Appellants. In addition to disregarding the explicit statutory language setting the price for distribution of the TCA, allowing free access through TPRA requests would wholly undermine the Legislature's chosen means of compensating the Code Commission's publisher of choice for the contracted-for services the publisher (currently Lexis) provides. The Code Commission must contract with a "law book publisher" to produce, distribute, and maintain the TCA. Tenn. Code Ann. § 1-1-106(a); *see also* 1953 House Journal, pages 213-217 (determining services of outside publisher necessary to assist with administration and maintenance of TCA). The Code Commission cannot pay for the publisher's services directly, "and the publisher ***shall be required to depend for compensation upon on the proceeds of the sale of the publication***." Tenn. Code Ann. § 1-1-113(b) (emphasis added).

Because the Code Commission cannot pay for a publisher's services, the publisher must rely on selling copies of the TCA to recoup its expenses. Allowing free access to the TCA under the TPRA would mean that, the public would never pay any price to the publisher because the TCA is freely accessible through TPRA requests. Few, if any, consumers would choose to pay the Code Commission's chosen price, effectively leaving the Code Commission unable to compensate its chosen publisher. With no way to recoup expenses, the Code Commission would undoubtedly have difficulty securing and retaining any publisher, let alone a publisher with the resources and expertise necessary to provide "high editorial and publishing quality." *Id.* Thus, even if this Court determines copies of the TCA must be produced in response to TPRA requests, the cost borne by the requestor must be cost the Code Commission has directed Lexis to charge. Otherwise, with TPRA requests replacing license requests, the Code Commission would be unable to comply with the statutory requirements the Legislature has imposed on it.

III. THE CHANCERY COURT EXCEEDED ITS AUTHORITY WHEN IT DECIDED ON THE VALIDITY OF THE STATE'S CLAIM OF COPYRIGHT OVER CERTAIN PORTIONS OF THE TCA.

Although unnecessary to rule on the Petition, the Chancery Court fundamentally exceeded its subject matter jurisdictional limits to examine and rule on the validity of the State's claimed copyright over portions of the TCA. The framers of the U.S. Constitution believed that codifying intellectual property (IP) rights at the federal level was important to economic independence, innovation, and domestic growth. IP rights were established in the U.S. Constitution in Article I, Section 8, which declares that Congress has the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This "IP Clause" text has been attributed to James Madison and James Pinckney, who both submitted proposals related to IP rights at the Constitutional Convention of 1787 in Philadelphia. The IP Clause was approved unanimously by the delegates without debate.[14] The validity of a copyright is a matter of federal law that should be decided by a federal court. 28 U.S.C. § 1338(a) ("No State court shall have jurisdiction over any claim" under copyright law); *see also Ritche v. Williams*, 395 F.3d 283, 287 (6th Cir. 2005) (recognizing the "complete preemption" by federal law of claims that "must be recharacterized as...copyright ownership claims"); *Stark v. Gov't Acct. Sols., Inc.*, No. 2:07-cv-755, 2009 U.S. Dist. LEXIS 17895, at *10 (S.D. Ohio Mar. 9, 2009) ("a state court's findings on matters distinctive to copyright law itself are not entitled to preclusive effect because, given exclusive federal jurisdiction over copyright infringement actions, the findings cannot have been necessary to the state-court judgment"). The Chancery Court's decision that the TCA is "disqualifie[d] as protected by

[14] Ochoa, Tyler T. and Mark Rose. 2002. The Anti-Monopoly Origins of the Patent and Copyright Clause. Journal of the Patent and Trademark Office Society. 84 (12): 909-940.

copyright law" goes to the very core of copyright law – and therefore can only be decided by a federal court vested with the exclusive jurisdiction to resolve copyright claims.

Moreover, from the perspective of Lexis's response to Appellants' TPRA request – the only issue before this Court – the validity of the State's copyright is wholly immaterial. Lexis's contract with the Code Commission provides that with respect to all contents of the TCA, "all copyrights thereto shall be vested, held, and renewed in the name of the State of Tennessee." Contract § 6. This Appeal concerns ***only*** Lexis's denial of the TPRA request directed to it. Lexis is contractually obligated to uphold the State's claimed copyright, and Lexis is not independently empowered to determine whether such a copyright exists or is valid. So long as the State claims a copyright over any portion of the TCA, Lexis is contractually obligated to uphold and protect that copyright. To require otherwise would be to require Lexis, as a private, third-party publisher, to decide on the validity of a copyright, an issue of federal law, that is held by the State of Tennessee. The Chancery Court's decision on the copyright protection afforded the TCA is a testament to judicial disregard for the fundamental, Constitutional vesting of copyright law as solely within the exclusive jurisdiction of federal courts and one which should be vacated by this court.

CONCLUSION

First and foremost, this Court should reverse the Chancery Court's unnecessary determination that Lexis, a private publisher providing specific, contracted-for services to the Code Commission, is the functional equivalent of a government agency that must provide for public access to ***all*** the records in its possession in any way relating its work for the Code Commission. Regardless of how this Court decides on the remaining issues in this Appeal, this decision must be reversed, even if the overall outcome – that the Petition be dismissed – remains the same. Second, this Court should affirm the Chancery Court's decision that the TCA is not within the scope of public records that must be provided under the TPRA because access is "otherwise provided by

state law," regardless of whether such access is made through the legislative computer system or not. Finally, this Court should find that the Chancery Court exceeded its jurisdiction when it opined on the underlying validity of the State's claimed copyright over certain portions of the TCA and vacate that portion of the Chancery Court's decision.

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CERTIFICATE OF COMPLIANCE

This brief contains 12,126 words and thus complies with the applicable limitation in Tennessee Rule of Appellate Procedure 30(e).

This 6th day of March, 2023.

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CERTIFICATE OF SERVICE

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